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U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D C.

CASE NO. 88-ERA-15

IN THE MATTER OF

ANDREW BARTLIK,
COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

REMAND ORDER

The Administrative Law Judge (ALJ) in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), submitted a Decision and Recormended Order (R. D. and O.) holding that Respondent discriminated against Complainant when it failed to extend his contract as an engineer working on Respondent's nuclear plants beyond November 25, 1987. The ALJ recommended an award of $43,700 in back pay and damages, and in a supplemental order he recommended the award of $105,288.35 in attorney's fees and $18,029.36 in costs.

The R. D. and O. sets forth the facts in some detail. R. D. and O. at 2 - 11.[1] Complainant was employed by Respondent as a "staff augmentee," an individual provided by an outside engineering or technical services firm who works under the direct supervision of Respondent's managers, in 1985 and worked on the fire protection programs at several TVA nuclear plants. R. D. and O. at 2-4. Complainant worked as part of the Knoxville Central Staff which provided engineering services to various TVA nuclear power plants, each of which also had its own engineers. Transcript of hearing (T) -15; see Appendix A to Complainant's Brief in Support of the R. D. and O., an organization chart showing the relationship of the Knoxville Central Staff and the

Sequoyah Nuclear Plant engineering staff, and Complainant's position in the organizational structure.

From 1985 to May 1987, Complainant was on a staff

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augmentation contract through Gibbs and Hill, a contractor supplying personnel to work under TJA supervision. T. 12-13. Complainant was assigned to work on the fire protection program at the Sequoyah Nuclear Plant in January 1987, T. 10, as part of the effort to return that plant to production of electricity.[2] Sequoyah had been shut down in 1985 due to safety concerns and management problems. R. D. and O. at 2; T. 627-28.

Complainant raised a number of cuestions about the fire protection program throughout 1987, R. D. and O. at 6-9, and in several instances had serious disagreements with other engineers, including some managers, about the validity of his concerns. T. 32; 42-43; 59; 68; 72; 77-78; 81; 94; 98-99; 106-107; 140-42. Many of these disagreements grew out of comments Complainant had given to Edward Sheehy, an electrical engineer and systems analyst, on a document drafted by Mr. Sheehy, Revision 7 of the functional requirements for safe shutdown of the Sequoyah plant in case of fire. T. 374; 398. When no action was taken to implement Revision 7, Complainant drafted a memorandum for signature by Ricky Daniels, the Sequoyah Lead Mechanical Engineer, which was sent to John Hosmer, the Sequoyah Project Engineer on August 28, 1987

In the summer of 1987, TVA decided to phase out staff augmentation contracts and to contract for outside engineering services through "managed task contracts" with engineering firms which would supervise the individual engineers and would be responsible for completing a specific engineering product or "task." T. 654; 719.[3] Staff augmentation contracts were to be largely eliminated by September 1, 1987, and any extension of a staff augtnentation contract for work at Sequoyah had to be approved by John Hosmer, the Sequoyah Project Engineer or the Assistant Project Engineer Douglas Michlink, and by Charles Fox or Chuck Mason, Deputy Managers of Nuclear Power of TVA. T. 656- 58; 719-21.

When Gibbs and Hill's contract with TVA ended in May 1987, complainant's TVA supervisors arranged for him to continue as a staff augmentee with American Technical Associates until November 25, 1987. Complainant's TVA supervisors made several attempts to have Complainant's employment extended past November 20, as a staff augmentee, T. 155-60; 176-77; 180; 191; 197, but these requests were denied. T. 516-17; 728-31. Although funds were set aside in November 1987 for a managed task contract for work on the fire protection program at Sequoyah, T. 784-86,

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Complainant was not hired for that contract and his last day of employment at TVA was November 25, 1987.

The ALJ held that "TVA chose not to retain [Complainant's] services . . . because of his persistence in following up problems which he believed needed to be corrected." R.D. and O. at 11. The ALJ reached this conclusion because he found that:

> 1. Complainant's supervisors made several attempts to retain Complainant under one form of contract or another, R.D. & O. at 10;
> 2. "most" of the engineers employed under the staff augmentee system of contracts continued to work at TVA under managed task contracts, *id*. at 3;
> 3. Respondent was "in the habit of arranging for the services of particular engineers through its contractors," *id*. at 11; and
> 4. work on the fire protection program at Sequoyah needed to be done and some of it was done before the plant was restarted. *Id*.

The ALJ determined that "[t]hese factors, when combined with management's failure to provide for [Complainant's] continued employment, were ample evidence of discrimination." *Id*.

The ALJ's R. D. and O does not make specific credibility findings on the testimony of the witnesses or describe the weight given to particular testimony and exhibits which support the ALJ's inferences and conclusions, compared to otber parts of the record. Indeed, there are no explicit record references at all in the R. D. and O. Courts have held that "[w]here an agency's decision concerns specific persons based upon determination of particular facts and the application of general principles to those facts . . . courts 'demand that the decision-maker's opinion indicate an appropriate consideration of the evidence . . . . '" *Tieniber v. Heckler*, 720 F.2d 1251, 1255 (11th Cir. 1983)(citation omitted). If credibility determinations are critical, the agency must articulate them with sufficient clarity to determiiie whether the ultimate finding of liability is supported by the record. *Id*. I find that there are several aspects of the record which must be addressed before one can conclude that Complainant has carried his burden of proving by a preponderance of the evidence that retaliation was a notivating factor in the failure of Respondent to retain his services. *See Dartey v. Zack Company of Chicago*, 82-ERA-2. Secretary's Final Decision and Order April 25, 1983, slip op. at 6-9.[4]

The focus of this case is on the actions, or failures to

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act, of three top managers of Resporident, John Hosmer, the Project Engineer at Sequoyah, Douglas Michlink, Assistant Project Engineer at Sequoyah, and Charles Fox, Vice President and Technical Director of Nuclear Power for TVA. Complainant's immediate supervisors, Jimmy Pierce, Appendix R Progran Manager,[5] and Steve Cook, engineering specialist, as well as managers two and three levels above Complainant such

as George Cooper,[6] Assistant Chief of the Mechanical Engineering Branch, Charlie Chandley, Chief of the Mechanical Engineering Branch, Jim Key, Assistant Project Engineer for Sequoyah stationed in Knoxville, Ricky Daniels, Lead Mechanical Engineer at Sequoyah, and Tom Luke, Acting Lead Mechanical Engineer at Sequoyah in Mr. Daniels' absence, all either supported Complainant on the safety issues he raised or made attempts on his behalf to get his staff augmentation contract extended or get him hired by managed task contractors. T. 13; 25; 32; 40; 67; 84; 121; 133; 154-56; 160; 176; 180; 191-92; 727; 729-30; 783; 809; 999; 1001; 1002; 1010; 1014; 1031; 1094.

Mr. Hosmer, Mr. Michlink and Mr. Fox each explicitly denied knowing who Complainant was and, necessarily, that he was involved in raising questions about the fire protection program at Sequoyah, at the time the staff augmentation contract extensions and managed task contract proposal for fire protection program work were considered by them.[7] Mr. Hosmer testified that prior to Thanksgiving of 1987, he did not know who Complainant was or that he was involved in Appendix R issues.[8] Mr. Hosmer said the first time he became aware that Complainant was involved in Appendix R issues was when Mr. Cooper called to tell him Complainant had threatened to bring up concerns about Appendix R at Sequoyah, T. 525; Mr. Cooper made that call to Mr. Hosmer sometime after December 18, 1987, when Complainant had called Mr. Cooper threatening to file a complaint with the Department of Labor and the Nuclear Regulatory Commission. T. 1016; 1019. Mr. Cooper testified that he had not spoken to Mr. Hosmer about Complainant raising Appendix R issues before that telephone call. T. 1019.

Mr. Hosmer also denied having a discussion with Ed Sheehy about assigning Complainant to work on a task force on these issues. T. 526. Mr. Sheehy, however, testified that he met with Mr. Hosmer on the evening of December 7, 1987, to prepare

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Mr. Hosmer on Appendix R issues for a meeting the next day with the NRC, and when Mr. Sheehy suggested that Complainant be assigned to the task force, Mr. Hosmer strongly opposed the suggestion, giving Mr. Sheehy the impression Mr. Hosmer knew who Complainant was. T. 408-409. In addition, Revision 7 was written by Mr. Sheehy, T. 374, with Complainant only providing comments which were incorporated by Mr. Sheehy, T. 374-75, and Complainant is not mentioned in the August 28 memorandum from Mr. Daniels to Mr. Hosmer. C-8. Mr. Sheehy also wrote a detailed memorandum summarizing a meeting held on October 19, 1987 to discuss Revision 7, C-9, and although Mr. Hosmer was listed as a recipient of a copy, he said that did not remember reading it, T. 555, and Complainant's name only appears once in the memorandum, on the list of those in attendance.

The ALJ held that Mr. Hosmer "knew [Complainant] and, either from first-hand information or supervisory reports knew about many, if not all of the problems which [Complainant] raised." R.D. and O. at 10. The ALJ did not cite or discuss any testimony or exhibits which support that conclusion, nor did he resolve any of the apparent conflicts

in the record mentioned above or state which testimony he credited and which he did not.[9] The ALJ's statement in the introduction of the decision that his "findings and conclusions are based upon my observation of the appearance and demeanor of the witnesses . . . " is not sufficient for the Secretary to review the recommended decision.

Similarly, Mr. Michlink testified that he discussed a request for an extension of Complainant's staff augmentee contract, R-(Respondent's Exhibit) 13, with Mr. Hosmer, but at the time Mr. Michlink did not know who Complainant was, had never heard of him, and did not know Complainant was involved in Appendix R issues. T. 730. Mr. Michlink also reviewed and commented on a proposed managed task package for work on Appendix R issues on November 18, 1987, which had been submitted by Mr. Daniels, the Lead Mechanical Engineer at Sequoyah. T. 786; C-17. Mr. Michlink denied asking Mr. Daniels whether this package was for Complainant and never received a response from Mr. Daniels to his questions about the package. T. 787. Mr. Pierce, Complainant's immediate supervisor, testified that the work in this task package was done by TVA employees, not outside contractors. T. 1071.[10] On December 12, 1987, Mr. Michlink signed for Mr. Hosmer a request to Mr. Fox for approval of a task package for an outside consultant to analyze

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the status of Appendix R compliance at Sequoyah. T. 885; C-54. Mr. Michlink testified he did not know who Complainant was at that time. *Id*.

Mr. Michlink thus was directly involved in the rejection of staff augmentation contract extensions for Complainant and the approval process for managed task contracts under which Complainant asserts he should have been hired. Mr. Michlink was responsible for implementing the plan to phase out staff aucjmentee contracts, his approval was required for all staff aucjmentee contract extensions, and he had the responsibility to "handle, process, issue and control [and] monitor" managed task contracts at Sequoyah. T. 717-18. The ALJ'S recommended decision, however, does not mention Mr. Michlink or explain how he reached the conclusion that "management [in which Mr. Michlink played a key role] had determined not to approve any further contracts for [Complainant's] services."

Charles Fox was Deputy Manager of Nuclear Power of TVA in 1987 responsible for contracts for engineering services for the "recovery" program to return TVA's nuclear power plants to power production. T. 627. When TVA decided to phase out all staff augmentee contracts, Admiral White, the Manager of Nuclear Power, directed that all requests for extensions of staff augmentee contracts be approved either by Mr. Fox or Admiral White's other Deputy, Chuck Mason. T. 658. Mr. Fox rejected a staff augmentation extension request for Complainant on December 14, 1987, C-22, because it proposed work on the Bellefonte Nuclear Plant, a facility TVA planned to "mothball," T. 666, and because TVA was phasing out staff augmentation contracts. T. 667. Mr. Fox testified he had never heard Complainant's name at that time, T.667, and did not associate him with Appendix R issues at Sequoyah, T. 668, but only becane aware of Complainant

when his name was mentioned in a newspaper article on December 23. T. 708. The ALJ did not explain whether Mr. Fox was one of the managers who "had determined not to approve any further contracts for [Complainant's] services," R. D. and O. at 10, and if so, what support he found in the record for this conclusion.

When TVA phased out staff augmentee contracts in favor of managed task contracts, the ALJ found that "TVA continued to deal with many of the same engineers [and] most, if not virtually all of the 2,100 engineers employed under the staff augmentee program would continue employment under the new contracting arrangement." R.D. and O. at 3. The ALJ did not provide any specific references to the record to support this conclusion. Mr. Bryans, the United Engineers and Constructors (UE&C) Project Manager for

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a managed task contract with TVA from July 1987 to January 1988, T. 798, testified that UE&C provided some staff augmentees to TVA prior to that, T. 840, and approximately 80% of the UE&C staff augmentees were "rolled over" to the managed task contract. *Id.* The remaining 20 percent of the positions were filled by transferring UE&C employees from other parts of the country and "there might have been an individual that was formerly a job shopper [staff augmentee] . . . . " T. 842. Mr. Michlink testified that generally the staff augmentees who became employees of the managed task contractors were the ones who had been associated with a successful bidder on a managed task contract.[11] T. 885.

The ALJ acknowledged that each managed task contractor had complete authority for hiring its employees under the contract, but he found that "TVA had the natural ability as contracting authority to suggest or recommend that certain engineers be hired to work on specific projects . . . [and] TVA managers [had] a significant influence over which engineers were employed and which ones were not." R. D. and O. at 4. Mr. Michlink testified, however, that TVA did not get involved in selecting the employees of a managed task contractor, T. 745, and Mr. Bryans testified it would be unusual for TVA to request a particular person for a managed task. T. 830-31. The ALJ did not cite any other part of the record, or address this testimony, when he concluded that "TVA was in the habit of arranging for the services of particular engineers through its contractors," R. D. and O. at 11, nor did he explain, in light of the testimony of Mr. Hosmer, Mr. Michlink and Mr. Fox discussed above, how that intermediate conclusion, even if true, leads to the ultimate finding that Respondent discriminated against Complainant.

The ALJ made a number of findings on the impact of Appendix R and the issuance of Revision 7 on TVA's effort to restart the Sequoyah plant, and reached some conclusions about the motives of TVA management derived from those findings. For example, the ALJ found that Complainant discovered "glaring deficiencies in TVA's Appendix R analysis," R. D. and O. at 6, which Complainant and his supervisor (presumably Mr. Pierce) believed were "restart" issues, that is, questions which had to be resolved before the plant could be restarted. R. D. and O. at 7. Complainant recommended the

establishment of a tear of engineers to analyze the Appendix R issues raised in Revision 7, but, the ALJ found, "plant management rejected the recommendation because they felt it was expanding the scope of the work and would delay the restart schedule . . . . [Therefore] the project was stalled by

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upper management until after [Complainant's] termination." *Id*.

The ALJ never specified who in "plant" or "upper management" had taken these actions or what parts of the record supported his apparent conclusion that these actions demonstrated illegal motive. Perhaps the most cogent explanation of the history of Revision 7 is the statement given by Mr. Daniels to the Wage-Hour investigator only a few months after the events giving rise to this case, R-16, but the statement is not referred to by the ALJ.[12] Mr. Daniels was the manager who had signed the important August 28 memorandum to Mr. Hosmer drafted by Complainant. C-5.

Mr. Daniels stated

> During the late summer of 1987 . . . the Appendix R lead responsibility was to be transferred to the Division of Nuclear Engineering from the Operations organization . . . . This required the transfer of all information to DNE and the cataloguing and filing of the documentation compiled by operations in gaining compliance to Appendix R. This transfer of responsibility and the associated documentation was discussed among myself, J. Pierce [one of Complainant's immediate supervisors], and G.P. Cooper [Assistant Chief of the Mechanical Engineering Branch in Knoxville]. We discussed the magnitude of the pending transfer of responsibility for Appendix R and thought it appropriate to compile a multi-discipline team of enaineers who would organize the information to be transferred.
> This task was not related to restart of [the Sequoyah plant]. TVA's Appendix R program had been audited earlier in the summer of 1987 by the NRC. In NRC's opinion, TVA was in compliance with Appendix R's regulatory requirements. Nonetheless, we wanted the team to retrieve and organize the information for future reference and audits. The August 28 memo . . . documents this request, but omits the restart statement. It was superseded by my September 30, 1987 memo . . . to J. Hosmer with this clarification.

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> This task was not conceived to address the concerns of [Complainant] . . . . He had not identified or documented any deficiencies at that time to my knowledge.
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> The August meno lacked the proper identification as to priority relating to other issues and was slbsequently superseded by the September 30 memo. The September 30 meno stated that the task group formation was not a restart issue. I

> am not aware that [Complainant] disagreed with this decision when he was at TVA. The task group was not given priority over other more immediate restart related tasks. This was the true reason for the late formation of the task group . . . .

R-16 at 1-5.

A document which tends to support Mr. Daniels' explanation of the origin of the Appendix R - Revision 7 issues and the level of priority given to them by TVA is an NRC Inspection Report of a fire protection inspection of Sequoyah conducted on March 14-18, 1988. R-21B. Enclosure 2 of the report addressed "[q]uestions raised as a result of the development of Revision 7 . . . . " NRC made the following findings:

> During TVA's calculational review process the Appendix R safe shutdown logic analysis . . . was re-evaluated. The basis for TVA's Appendix R program which was reviewed by the NRC staff had been Revision 6 . . . . The resulting re-evaluation became Revision 7 (R7) to this calculation.
> R7 represented a change from previous revisions of this calculation. The authors used as their objective not the requirements of Appendix R but what in their opinion was necessary to achieve safe shutdown. One of the stated purposes of Appendix R is to achieve safe shutdown but the authors of R7 felt that, ". . . a rather large gap is possible between an implementation program which is legally responsive to Appendix R, and one which is technically responsive. The NRC staff does agree that individual licensees can improve their fire protection and safe shutdown programs beyond the minimum requirements of the Appendix R regulation; however compliance with the requirements of Appendix R does provide a technically responsive fire protection

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> and safe shutdown program. As a result many items regarded as "issues" in R7 were not fixed on a regulatory basis. Furthermore many of these "issues" have been addressed in other design processes.
> Although R7 had been reviewed and approved by the Design Engineering staff, it was not reviewed by, or concurred with, by the Sequoyah operations staff. As a result when R7 was presented to the operations staff, disagreements occurred on the validity of the calculation and the prudence of attempting to implement many "issues" which in the operations staff's opinion were already encompassed by existing plant design. The addition of requirements beyond previous commitments and the lack of interface review then became major issues preventing the revised analysis from replacing the R6 analysis as the design basis for the Sequoyah Nuclear Plant.
> A TVA review team was formed to scope the issues in question and provide information to the Sequoyah Project Engineer so that decisions could be made on which items required pre-restart action for [Sequoyah].

R-21B, Enclosure 2, page 1. The NRC report found that "many of the declared requirements from R7 are beyond the requirements of Appendix R . . . . We do not agree

that 'in all cases those requirements are considered necessary for safe shutdown under fire conditions.' [Quoting from R7] The TVA task force recommended that Revision 7 . . . be revised. The calculation has been revised to only include those items that are expressly required to meet . . . Appendix R." Id. at page 2. The ALJ did not address how these explanations of tlle background of Revision 7 affected, if at all, his conclusions that Complainant was the one who "determined that there were glaring deficiencies in TVA's Appendix R analysis that could not be explained from the available documentation," and "recommended the establishment of an Appendix R team," and the conclusion that "[t]he project was stalled by upper management until after [Complainant's] termination."

For all of the above reasons, this case is remanded to the ALJ for submission of a revised recommended decision specifically addressing these questions and supporting his inferences and conclusions with explicit references to the record.

SO ORDERED.

LYNN MARTIN

Secretary of Labor

Washington, D.C.

**[ENDNOTES]**

[1] The "Statement of Facts" in the R. D. and O. includes the ALJ's inferences and conclusions as well as presentation of the facts in the case.

[2] All of Respondent's operating nuclear plants had been shut down. T. 627.

[3] The parties vigorously disputed whether the change from staff augmentation contracts to managed tank contracts was made by TVA for increased efficiency and to save money or for better management and higher quality of engineering services. *See*, e.g., T. 630-55. Since there has been no suggestion that this agency-wide change in the manner of crocuring engineering services was a pretext for the elimination of employees engaged in protected activities, I find this issue largely irrelevant.

[4] TVA argues in a footnote that this case should be dismissed because the ERA only protects employees who have complained to the NRC. Respondent's Brief in opposition to the Administrative Law Judge's Recommended Decision and Order, at 29 n.24. I continue to adhere to the Secretary's oft-stated position that internal safety complaints are protected under the ERA. *See Bivens v. Louisiana Power & Light*, Case No. 89-ERA-30, Secretary's Decision and Order of Remand, June 4, 1991, slip op. at 4-5, and *compare Mackowiak v. University Nuclear Systems*, *Inc*., 735 F.2d 1159, 1163 (9th Cir. 1984); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Consolidated Edison Co. of.N.Y. v. Donovan*, 673 F.2d 61 (2d Cir. 1982), *with Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1031 (5th Cir. 1984).

[5] Appendix R is an appendix to the Nuclear Regulatory Commission (NRC) regulations on the construction and operation of nuclear power plants, 10 C.F.R. Part 50 (1990), dealing with fire protection.

[6] In the summer of 1987, Mr. Cooper and Mr. Cook offered complainant a permanent job with TVA, but Coriplainant rejected it because the pay was too low and he didn't want to make a long term commitment to living in Tennessee. T. 195-96; 998-99.

[7] Knowledge of the protected activity on the part of the alleged discriminatory official is, of course, an essential element of Complainant's case. *See Atchison v. Brown & Root Inc*., Case No. 82-ERA-9, Secretary's Decision and Final order June 10, 1983, slip op. at 15-16, *revd on other grounds, Brown & Root, Inc. v. Donovan*, 747 F.2d 1029; *Frazier v. Merit Systems Protection Bd.*, 672 F.2d 150, 166-68 (D.C. Cir. 1982).

[8] Mr. Hosmer managed 3,000 TVA and contractor employees, T. 506, including about 1,000 engineers. T. 719.

[9] The ALJ apparently held, and I agree, that an incident in which Complainant disputed some statements made by Mr. Hosmer in a meeting with several hundred engineers, where Complainant was standing in the rear of the auditorium and did not identify himself, T. 144-48, was not the source of Mr. Hosmer's knowledge of complainant nor did it form the basis of Mr. Hosmer's actions. R. D. and O. at 9-10.

[10] Complainant also asserted that there was a significant amount of work to be done when he left TVA on another specific issue he had raised, the integrity of instrument sense lines in a fire. T. 134. Complainant said Tom Luke, the Acting Lead Mechanical Engineer at Sequoyah, "proposed" a staff augmentation extension for Corplainant to work on this issue, T. 133, which would have required approval by Mr. Hosmer, but it never was approved. However, Mr. Cooper, Assistant Chief of the Mechanical Engineering Branch in the Knoxville Central Staff, who had recommended Complainant by name to Bob Bryans of United Engineers and Constructors for hire under their managed task contract, T. 1002, testified that he decided there was only about one or two weeks of work left on that issue and the work could be done by a TVA engineer rather than contracting it out. T. 1004-05. The ALJ did not resolve these apparent inconsistencies in the record.

[11] Counsel for Complainant objected to this testimony on the grounds that it was "very general," and the ALJ sustained the objection. T. 886. I find no basis for sustaining such an objection, although counsells comment may go to the weight to be given to this testimony.

[12] Both parties had an opportunity to question Mr. Daniels at the hearing. T. 920-936.